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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HAR CONSTRUCTION, INC., Plaintiff, Respondent and Cross-Appellant, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant, Appellant and Cross-Respondent.	D045985 (Super. Ct. No. GIC817920)

APPEAL and cross-appeal from a judgment and posttrial orders of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

This action for damages for breach of contract arises out of a construction contract for school improvements between plaintiff and cross-appellant HAR Construction, Inc. (HAR) and defendant and appellant San Diego Unified School District (the District). After jury trial on HAR's breach of contract allegations, judgment was entered on a

general verdict for $860,000 damages in favor of HAR. The trial court denied the District's motion for new trial, and also denied HAR's motion for an award of attorney fees based on a clause in the performance bond.

The District appeals the judgment, contending the trial judge abused its discretion in failing to allow the District to present certain testimony from its expert economist witness, and further erred in denying its new trial motion according to the court's interpretation of the contract and its damages limitation language. HAR cross-appeals, contending the trial court erroneously denied its motion for attorney fees, by failing to interpret all the contract documents together correctly. (Civ. Code, § 1717.)

We find no error or abuse of discretion by the trial court in its evidentiary and legal rulings concerning the presentation of evidence by the District's economist. We further find that the judgment for damages in favor of HAR is adequately supported by sufficient evidence, and in addition, the trial court did not erroneously allow damages to be awarded in excess of what was permitted by the contract language. We further agree with the trial court that HAR's motion for attorney fees was not well grounded in the contractual language and was properly denied. We affirm the judgment and posttrial orders.

FACTUAL AND PROCEDURAL BACKGROUND

We need only generally outline the transactions and proceedings, because, as noted by the District in its brief, many of the specific details of the construction contract and work performed are not germane to the issues raised on appeal. We first focus upon the manner in which the respective parties presented their cases regarding damages, in

light of their differing contract interpretation arguments. More facts regarding the competing attorney fees clauses will be set out separately in part III, *post*.

A

Background: Contract Provisions

In December 2002, after a bond issue authorized by proposition MM, the District entered into a contract with HAR to modernize and improve existing structures at San Diego High School, pursuant to plans drawn up by the District's architect, Roger Eliot Kerr. The work to be performed, "San Diego High School Modernization Project Increment 2," was composed of five particular projects and the upgrading of several buildings at the school. The contract was composed of a separate agreement that showed HAR's successful $2.3 million bid, together with a number of other listed contract documents, most notably the "General Conditions," containing the disputed provisions of the contract, as will be described. The agreement also incorporated other component documents including the performance/material bonds, workers compensation information, and bidding information. The parties agreed that HAR would begin work on an accelerated basis, immediately after the agreement was signed in December 2002, although the original start date was set for February 2003.

As relevant here, the contract's general conditions contain several important provisions. First, section 8.1 et seq. (providing for the "schedule of values" to be prepared and transmitted) establishes a procedure for costs breakdown and progress payments to be made. The schedule of values is a template which lists numerous portions of the work, such as labor, material, or other tasks, and the estimated costs for each of

them. It also establishes that the District "shall" make any objections to the contractor's schedule of such costs, by notifying it in writing of its objections within 10 days, to which a response may be made, until agreement is reached.

The general conditions also contain provisions for change orders in section 11.1 et seq., applicable to additional work or instructions, or deletion of work. Both oral and written change orders are allowed, and section 11.4 et seq. apply to adjustments to be made to the contract price and time on account of changes to the work. Section 11.4.2 allows negotiation and mutual agreement as a method for such valuation.

Next, as eventually happened, the District reserved the right in section 17.4 to terminate the contract for its convenience, on specified terms, in the following language, italicized to show the two main areas of dispute here:

> "17.4 Termination for Convenience of the District. [¶] The District may at any time, in its sole and exclusive discretion, by written notice to the Contractor, terminate the Contract in whole or in part when it is in the interest of, or for the convenience of, the District. *In such case, the Contractor shall be entitled to payment for*: *(i) Work actually performed and in place as of the effective date of such termination for convenience of the District, with a reasonable allowance for profit and overhead on such Work, (ii) reasonable termination expenses* for reasonable protection of Work in place and suitable storage and protection of materials and equipment delivered to the site of the Work but not yet incorporated into the Work; and (iii) retainage on work completed *provided that such payments, exclusive of termination expenses shall not exceed the total Contract Price as reduced by payments previously made to the Contractor and as further reduced by the value of the Work as not yet completed. The Contractor shall not be entitled to profit and overhead on Work which was not performed as of the effective date of the termination for convenience of the District*." (Italics added.)

Further, the general conditions contained an attorney fees clause, section 19.13, providing that each party shall bear its own attorney fees in the event of an action arising out of the agreement. However, the performance bond purchased by HAR, in compliance with section 6.10 of the general conditions, included an attorney fees clause referring to recovery of fees from the surety, in the event a successful suit were brought upon the bond by the owner (the District).

B

Starting Date and Work Performed

HAR began work on the project on an accelerated basis in December 2002, although it was not actually on-site until February 2003. The parties held several preconstruction meetings at which the plans and specifications and scheduling were discussed. Pursuant to the procedures created by the contract's general conditions, section 8.1 et seq., HAR prepared a January 28, 2003 schedule of values of the work to be performed. It lists approximately 40 separate line items of tasks and their anticipated costs, such as bonding, testing expenses, demolition, earthwork, carpentry, etc. Within weeks, a "chemistry problem" developed between HAR and the District officials managing the project. HAR officials pointed out that some of the District's specifications in the plan did not match the physical conditions at the site.

Because of various difficulties encountered on the job, and after extensive negotiations, HAR prepared revised contract documents, payment applications, and change orders. HAR claimed at trial it complied with procedures created by District representatives, Steve Bovee, the District construction supervisor, and/or Roger Garza,

the high school project construction manager, for approval of the extra work and extra hours attributable to the early starting date and change orders (e.g., 52 extra days on the job). However, after extensive email exchanges among District representatives and letters to HAR, these revised contract documents were rejected by District personnel for improper format.

Eventually, HAR faxed a revised schedule of values to District representatives, dated March 3, 2003. HAR received no response objecting to the revised schedule of values. (At trial, the parties disputed whether the District received the revised schedule.) Later, additional proposed payment applications were sent, but eventually, the March 3 version (revised schedule of values) became the main subject of trial testimony regarding the measure of damages. In the revised schedule of values of the work to be performed, in addition to the original 40-something separate line items of tasks and expenses, numerous others were added and subdivided into particular tasks for each of seven separate buildings and six other phases of the project. Approximately three times as many tasks and costs are listed separately on the revised schedule of values, although no totals are given and the contract price remained the same, $2.3 million.

Eventually, several of the original five portions of the project were abandoned by the District (elevator, ramp, restroom) after problems continued with the reconciliation of the plans prepared by the District's architect and the plans made by HAR to carry out the work. More documents, email, and letters were sent back and forth, as described at trial. Other particular remaining problems in implementing the plans concerned the library carpeting and science laboratory casework.

After further difficulties developed at meetings in early March, the District exercised its power to terminate the contract for convenience, effective March 24, 2003, under section 17.4 of the general conditions. HAR left the job site at the end of March, after completing some but not all of the construction work. HAR estimated that 44 percent or more (up to 90 percent) of the work had been completed, while the District's architect Kerr claimed much less (16-18 percent). After conducting a walk-through, Kerr recommended paying HAR $386,150 for the work in place, while HAR was requesting much more based upon its evaluation of the completed work.

Specifically, HAR submitted an April 3, 2003 request for payment showing a revised contract price of $2.526 million, which included change orders of $226,694. According to HAR's April 3 letter and request for payment in the amount of $869,934.46, the amount of work admittedly remaining under the contract was $1.27 million, the "balance to finish." HAR also separately documented its termination expenses of at least $58,726.20.

Eventually, the District paid HAR approximately $490,000, based upon its own evaluation of the invoices, costs and site work progress.

Thereafter, one of HAR's subcontractors, Western Laboratory Casework, Inc. (Western Laboratory), sought to deliver chemistry laboratory equipment to HAR, which was no longer on the job. The District entered into a separate agreement in May 2003 with HAR to accept and pay for the laboratory equipment, and eventually, around the time of trial, in October 2004, it did.

C

Filing of Various Related Pleadings

In August 2003, the subcontractor Western Laboratory sued HAR and the District, as well as the surety on the performance/labor and material payment bonds (Gulf Insurance Company), to recover the amount due for the materials delivered.

In November 2004, HAR filed its complaint against the District for breach of written contract, both the original contract and the separate May 8, 2003 contract for delivery of the laboratory casework from Western Laboratory. A number of other theories were also alleged, including breach of implied warranty of correctness and cooperation (second cause of action). Further, HAR cross-complained in the underlying Western Laboratory action against the District.

In response, the District answered and filed a cross-complaint against HAR and others, seeking indemnification. The District eventually dismissed its cross-complaint before trial.

In March 2004, this action was consolidated with the one brought by Western Laboratory, which eventually settled with the District on its separate action before trial on HAR's complaint. Thereafter, all of HAR's causes of action were dismissed except for the breach of contract theories.

D

Jury Trial, Verdict and Judgment

The matter went to jury trial on HAR's remaining cause of action for breach of contract, to determine the value of the work in place at the time of the termination for

convenience. HAR was also seeking recovery of its reasonable termination expenses ($58,726) and compensation for extra work on the project according to the change orders ($226,694).

In connection with the dismissal of HAR's breach of implied warranty cause of action (alleging the District's negligence in preparing the plans), the District stipulated that it would not argue that HAR's claimed damages were beyond the four corners of the contract (although it could still attack the sufficiency of proof of damages). The District also sought an offset for the amount it paid to Western Laboratory for the equipment delivered under the separate agreement.

At the arguments on the numerous motions in limine, the District argued that the schedule of values approach was not appropriate in a termination for convenience situation, and that an approach using costs incurred based on HAR's documented expenses (plus reasonable profit) was proper. The trial court eventually ruled that the jury should decide as a factual issue whether the District had received the revised schedule of values prepared by HAR in March 2003, as it affected how to determine the damages for the work performed. The court noted that only an approved schedule of values could properly be used to determine payment for work completed. The parties discussed whether a special verdict or interrogatories should be used on this point, but never implemented this idea.

Both parties presented many percipient witnesses who gave their accounts of the difficult dealings between the parties. Both parties also submitted extensive expert accounting and construction methodology testimony. In broad summary, according to

the District, the correct method for computing damages under the contract (§ 17.4) was a "cost plus reasonable profit" formulation. The District argued to the jury that the costs to HAR gleaned from its invoices amounted to $438,000 or less, which was less than the amount already paid to HAR (about $490,000). Thus, the District took the position that HAR was claiming more than the contract allowed, and had improperly structured its schedule of values to require excessive progress payments too early in the contract period. The District's construction manager, Garza, first testified that he had received the revised schedule of values, reflecting the increased work performed, but he later denied that this document had been received. Garza also testified that he did not believe HAR had been overpaid, and Steve Bovee, construction supervisor for the District, stated that the architect's final estimates of work performed were low and HAR was due additional sums for the work.

The District's construction expert, William Schwarzkopf, testified that the work in place at the time of the contract termination should be valued using a costs plus reasonable profit approach, according to the construction costs tabulated by the accountants. Exhibit 296, prepared by HAR accountant Douglas Griffin, summarized the direct costs already incurred by HAR at $447,993 (not including indirect costs such as overhead).

During trial, the District sought at various times to present testimony from its expert economist, Carey Mack, who would have given the jury his own tabulation of costs incurred by HAR, as shown by its invoices. Mack's summaries of damages had been previously presented to the court as an attachment to a motion in limine, and

showed he estimated HAR's documented expenses were $439,000 or less. However, as will later be described, the District did not call Mack as a witness or read from his deposition, or present his chart, for various reasons, including the trial court's discussions with counsel about whether his testimony was still necessary or relevant in light of the court's other rulings on the factual issues about the timing of the receipt of the revised schedule of values by the District, and its effect upon any cost-based valuation of damages to be submitted to the jury. (See part II, *post*.)

In contrast, HAR's position at trial was that it had duly sent the District its revised schedule of values, the District had not timely objected as required by the general conditions, section 8.1, and the damages under the contract language should be computed according to this document, based on the work performed, and as interpreted by the experts. HAR also claimed amounts for change orders for additional work that raised the overall contract price to about $2.5 million, plus its termination expenses of somewhere between $58,726 and $160,000. HAR's expert construction consultant Ken Baker created a summary of damages that estimated that HAR was entitled to recover $853,762, above what had already been paid, based on his review of the paperwork and the project site conditions. This included termination expenses of $58,726 and change orders of at least $217,000. Baker relied upon an April 3, 2003 application for payment, showing that HAR was claiming it had earned approximately $1.25 million, and was still due $869,934, after the District's first payment of $386,150.

Numerous exhibits were admitted into evidence, including the original schedule of values, the revised schedule of values that HAR claimed that it had submitted to the

District in March 2003, and reams of negotiating letters and emails back and forth. HAR took the position that the District personnel's communications among themselves showed that they were avoiding the use of the term "approved" with respect to the schedule of values, or HAR's requests for payment, in order to avoid their obligations under HAR's change order requests, etc.

In closing argument, the District presented its position that it never received the revised schedule of values, which was in any case only representative of HAR's opinions. Accordingly, the District argued a different measure of damages was justified, costs plus reasonable profit, to determine that HAR was not owed any more than it had already been paid, based upon the only showing by HAR of its costs, which was incomplete. The District was relying on the documented costs set forth according to the Griffin summary, $447,000.

At the close of the proceedings, the jury was instructed, in relevant part, that it was to decide the factual issue of whether the District had received the revised schedule of values prepared by HAR in March 2003. If the jury found the document was approved, it must calculate damages based on the schedule of values and any other damages proven. If it found the schedule of values was not approved by the District, it could use either the schedule of values or the costs incurred plus a reasonable allowance for profit and overhead (plus any other proven damages).

After deliberations, the jury rendered a general verdict in favor of HAR for $860,000 damages.

E

Posttrial Proceedings

Subsequently, the District filed a motion for new trial, brought on grounds of excessive damages and insufficiency of the evidence to support the verdict. The District argued the contractual damages limit in section 17.4 of the agreement had not been properly applied, so that the verdict was not supported by the record. In denying the District's motion for new trial, the court ruled there was sufficient evidence at trial to support the verdict, as compensation for extra work approved and performed, and damages for termination costs.

HAR brought its motion for attorney fees, based upon the attorney fees provision in the performance bond. The contract's general conditions expressly state at section 19.13 that neither party is entitled to attorney fees or other costs from litigation arising out of the contract documents. However, HAR argued it was entitled to fees under the performance bond's provision for attorney fees for actions between the surety (Gulf Insurance Company) and the "owner" (the District). The trial court disagreed, concluding that although Civil Code section 1717 makes attorney fees provisions reciprocal for parties to the agreement, it will not create a right to attorney fees where one does not exist in the contract. Further, the trial court rejected an alternative argument by HAR that it was entitled to attorney fees under Public Contract Code section 7107 (not challenged here). The trial court made further rulings to deny HAR portions of the requested prejudgment interest under Civil Code section 3287, subdivision (a) (also not challenged here).

Judgment was entered for HAR in the verdict amount of $860,000, together with prejudgment interest, for a total judgment of $951,656.18 plus costs ($20,512).

Both parties timely filed their respective notices of appeal and cross-appeal of the judgment and orders.

DISCUSSION

I

INTRODUCTION

The District's appeal challenges the trial court's key legal and evidentiary rulings, claiming they denied it the opportunity to present in full its theory of damages. The District's major argument is that certain evidentiary error inevitably followed from the trial court's determination that the jury should decide as a factual issue whether the District had received the revised schedule of values prepared by HAR in March 2003, such that this schedule was deemed approved and could be used to calculate damages based on its showing of documented expenses, as well as any other damages proven. According to the District, that revised schedule of values was ineffective, because not received, and therefore, its own calculations of the costs incurred plus a reasonable allowance for profit and overhead should instead have been adopted by the jury (plus any other proven damages, such as termination costs). Therefore, the District continues to dispute that it was ever appropriately placed on notice of HAR's expenses incurred on the job, over the amount already paid, particularly with respect to change orders (approximately $226,000 worth). Accordingly, the District claims prejudicial evidentiary error from the trial court's disallowance of testimony from its economist Mack.

The District further claims the trial court erred in denying its new trial motion, thus effectively permitting HAR to recover damages in excess of the terms of section 17.4 of the general conditions in the contract. The District seeks to have this issue reviewed on a de novo basis as a question of law and contract interpretation.

In response, HAR contends there was no prejudicial evidentiary error, and in any case, substantial evidence supports its judgment for damages on the breach of contract theory. It disagrees that any contract interpretation issues are presented or preserved to justify de novo review on appeal of the damages verdict.

Further, HAR's cross-appeal seeks a contract interpretation that would enforce the attorney fees provision of the performance bond against the District, as a third party beneficiary of the bond provisions.

Given these conflicting approaches by the parties, our tasks are to analyze first, the appropriate standards of review, and then the support in the record, if any, for the general verdict for damages, in light of the challenged legal and evidentiary rulings. We then address the cross-appeal issues concerning attorney fees entitlement. (Pt. III, *post.*)

II

APPEAL

The District first takes the position on appeal that the trial court abused its discretion by making it impossible for the District to call its economist, Carey Mack, as a witness, to present his tabulations of costs claimed by HAR. This challenged evidentiary ruling stemmed from the underlying legal rulings that controlled the development of the evidence about HAR's contract damages. The District alternatively claims the trial court

should have interpreted the contract as not permitting damages in excess of the contractual limitations stated in section 17.4, and should have granted a new trial on that basis. To address these varying theories of legal and evidentiary error, we first outline several applicable standards of review, and then explain their interaction on this record.

A

Contentions Regarding Standards of Review

"It is well settled that 'Where several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it.' [Citations.]" (*Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149 1153-1154.)

It is also well established that "[a] general verdict implies a finding in favor of every fact essential to support it." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 13.) In this breach of contract case, the facts essential to support the verdict would include findings of the contract terms, performance by the parties or excuse, breach, and proof of damages. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleadings, § 476, p. 570.) We are required to examine the terms of the contract to evaluate the record and any legal and factual support of the judgment.

In doing so, we address the District's threshold contention that the trial court abused its discretion when it precluded the District from presenting expert evidence about its preferred damages theory, costs plus reasonable profit. This claim is based on

Evidence Code section 352, which states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The applicable rule of review for this argument regarding rulings by the trial court on the admissibility of evidence is an abuse of discretion standard. " 'Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.' [Citation.]" (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640 (*Sun Pacific*).) As long as there exists a reasonable or even fairly debatable justification under the law for the action taken by the trial court, it will not be disturbed on appeal, even if, as a matter of first impression, the appellate court might have taken different views of the issue. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.) The trial court's exercise of discretion will not be found to have been abused unless, under all of the circumstances, it clearly exceeded reasonable bounds. (*Sun Pacific*, *supra*, at p. 64.) A definitive showing of prejudice is required, and it is appellant's burden to overcome the presumption of correctness of the judgment. (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800-802.)

The District alternatively contends the verdict and judgment are not supported by a correct interpretation of the contract, such that the denial of a new trial should be set aside. This separate argument requires us to consider the District's contract interpretation claims, as well as certain public policy arguments based on the fact that this was a public works contract, to which statutory standards will apply. Ordinarily, a general substantial

evidence standard of review is utilized for challenges to a judgment based on excessive damages claims. "The reviewing court does not act de novo . . . the trial court's determination . . . is entitled to *great weight* because it is bound by the 'more demanding test of *weighing conflicting evidence* than our standard of review under the substantial evidence rule . . . ' *All presumptions favor the trial court's determination* . . . , and we *review the record in the light most favorable to the judgment* . . .' [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Writs and Appeals (The Rutter Group 2005) ¶ 8:140, p. 8-84, citing *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259.) Similarly, "the amount of damages awardable is a question of fact for the trier of fact (in a jury trial, first committed to the jury's discretion and next to the discretion of the judge on a motion for new trial)." (Eisenberg et al., Cal. Practice Guide: Civil Writs and Appeals, *supra*, ¶ 8:139, p. 8-83, citing *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727.)

Nevertheless, the District requests that we apply a de novo standard of review, involving the trial court's application of the contractual damages limitation language to a given set of facts. (See *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71 [the reviewing court exercises independent judgment as to the meaning of contractual language, and interprets the written documents de novo, to implement the parties' evident intent, unless credibility of extrinsic evidence is involved in such interpretation].)

B

Application of Standards: Rulings and Evidence at Trial

To review the record as a whole, we begin with the trial court's ruling about the factual issues concerning the District's presumed receipt of the revised schedule of values, based upon its lack of written objections to the copy that HAR demonstrated was provided to a District representative, Mr. Garza. The District does not directly challenge the conclusion that this was a factual issue, but it continues to dispute that the revised schedule of values could be used to compute damages. It maintains that it never received the revised schedule of values, which it argues was not necessarily accurate and simply represented HAR's opinions about what was due. The District believes it was therefore entitled to present Mack's testimony to support its preferred measure of damages, costs plus reasonable profit, as created by the general conditions of the contract, section 17.4. This section, applicable to "Termination for Convenience of the District," sets forth the criteria relied on here: "*In such case, the Contractor shall be entitled to payment for*: *(i) Work actually performed and in place as of the effective date of such termination for convenience of the District, with a reasonable allowance for profit and overhead on such Work, (ii) reasonable termination expenses . . . .*" (Italics added.)

We first take note that the record does not support any claim by HAR that the stipulation entered into regarding the dismissal of HAR's breach of warranty cause of action (District's negligence in preparing the plans), somehow waived the District's contract interpretation arguments. That stipulation was addressed to a separate theory of recovery and did not restrict the District from challenging the evidence regarding breach

of contract. The jury was correctly presented with the factual issues arising from the parties' conduct, and was allowed to determine their intent regarding compliance with the contractual procedures. (*Kaufman & Broad Building Co. v. City and Suburban Mortgage Co.* (1970) 10 Cal.App.3d 206, 215-216.)

The District relied upon its construction expert, Schwarzkopf, to say that a costs analysis should govern in this situation, based on the denial of receipt of the revised schedule of values. The District's original costs estimates from the existing invoices were in the neighborhood of $401,000 to $438,000 (from Mr. Mack's tables). At trial, it argued that HAR was no longer owed any more than it had already been paid, and moreover, HAR had not supplied sufficient evidence of any other approved costs (except for the $447,993 shown in the Griffin summary). The District claims it was unfairly prevented from making a more persuasive showing in support of such a costs analysis. However, to succeed in such a claim, the record must show the District made a sufficient offer of proof regarding Mack's testimony in order to preserve this issue and to show an abuse of discretion by the trial court. The District must also be able to demonstrate prejudice occurring when this testimony was not allowed.

The revised schedule of values provided a template of the various expenses for the items of work performed, but it ultimately had to be interpreted in light of the physical conditions at the school after HAR left the job site, to determine the extent of the work in place. As trial unfolded, the factual issues about whether the District had received the revised schedule of values also included numerous subissues about the manner in which the additional work and change orders were negotiated and approved. On its face, the

March 3 revised schedule of values did not establish the actual extent of the work in place by the end of the month. Instead, the progress of the work had to be evaluated by the District and HAR personnel and correlated to this revised schedule of values, as setting forth the tasks begun and/or completed. Extensive testimony at trial from the experts and the other witnesses addressed all of this. The current issue is whether the District should have been allowed to provide alternative, additional evidence of HAR's documented expenses on the job.

At trial, once the District's witness, Mr. Garza, acknowledged that he had received the revised schedule of values, exhibit 128, a great deal of discussion took place about whether he should be allowed to be recalled to change his testimony, since the District maintained he had been confused about which document was being referred to at the time. The trial court allowed this recall, because it was important to the factual issues about whether the District had been placed on notice by the revised schedule of values of the scope of the work claimed to be undertaken and/or in place. Mr. Garza then said he did not receive the revised schedule of values.

Although the District continued to seek permission to call Mack as a witness or read from his deposition, it also proceeded in another direction, by examining its construction expert, Mr. Schwarzkopf, about the merits of and the basis for a "costs plus reasonable profit" standard. Nothing more was said about Mack or his deposition. This occurred after the trial court indicated to counsel that the proposed Mack testimony about costs was no longer necessary or relevant in light of the court's other rulings on the factual issues about the schedule of values receipt by the District. In light of this

sequence of events, it appears that the District did not completely follow through on its efforts to present that witness, who was apparently only available one day. The record does not contain a specific offer of proof about how Mack's testimony about costs incurred would be materially different from the District's already established position that only about $447,993 in costs was properly payable to HAR, based on the figures provided by HAR's accountant Griffin.

HAR therefore argues the trial court did not actually exclude the testimony of this expert, because the District made a tactical decision not to pursue it. The record is clearly susceptible of such an inference, as well as an alternative inference, that the trial court did not expressly prohibit such testimony, but that Mack's availability admittedly became a side issue when the District chose to emphasize another approach. The District next pursued other witnesses about the disputed amounts of costs reported, change orders, and profits. These included its construction expert Schwarzkopf, the HAR accountant Griffin, and a HAR staffer, Ms. Garcia, to establish the reported costs, both direct and indirect (profit and overhead). In any case, we cannot conclude from this record that the trial court abused its discretion in erroneously disallowing testimony from Mack, in light of the inconclusive way in which the District sought to present and pursue it. As the appellant, the District has not shown how the trial court's evidentiary rulings improperly interfered with its genuine efforts to present its alternative approach for determining damages, costs plus reasonable profit, as allowed by the rulings and the jury instruction.

Moreover, the District has failed to sustain its burden of affirmatively demonstrating prejudicial error from the rulings regarding Mack, in light of other similar

evidence in the record about costs incurred by HAR. The trial court had a sufficient basis to treat the issue of receipt of the revised schedule of values as one of fact, and the jury had sufficient evidence to find the District had indeed received one, such that damages could appropriately be calculated from it. The record already contains the District's position that HAR's recovery should have been limited to the amount already paid, and that no further recovery was proper over that $490,000-plus payment, which in turn was based upon District costs estimates. However, the jury did not have to accept the District's position that no further recovery was proper, due to only minimal work in place as of the time of the termination for convenience. The jury had before it, as exhibit 82, HAR's April 3 letter and request for payment in the amount of $869,934.46, including change orders of $226,694. Also, the June 25 request for payment sought an additional $170,302.47 for products delivered after the termination for convenience. HAR's requests for payment also recognized that the amount of work admittedly remaining under the contract was $1.27 million, the "balance to finish." At trial, HAR's expert Baker estimated damages at $853,762, but the jury awarded $860,000, which was between HAR's two figures (e.g., the $869,934.46 request for payment). The record contains extensive evidence about the manner in which the change orders, early commencement of work, and modifications of the contract were processed between the parties, based on their negotiations, as anticipated by the general conditions. HAR also documented its termination costs, which were presented to the jury in amounts ranging from $58,726 to $160,000.

"[A] general verdict implies a finding in favor of every fact essential to support it." (*Luck v. Southern Pacific Transportation Co., supra,* 218 Cal.App.3d 1, 13.) In this case, the jury's award of $860,000 damages is supported by the implied findings that the revised schedule of values was received, the District was on notice of the scope of the work in place, and HAR had incurred extra expenses by performing more than the original tasks set out in the original schedule of values, as well as termination costs. As noted by the trial court when it denied the new trial motion, there was sufficient evidence presented at trial to support the verdict for termination costs and compensation for extra work performed. The trial court also ruled at that time, regarding prejudgment interest, that the amount of the damages in this case had depended upon a judicial determination based upon conflicting evidence. Both theories of damages were sufficiently outlined to the jury, and the District was not prejudicially prevented from presenting its position.

In conclusion, no abuse of discretion in the trial court's evidentiary rulings has been demonstrated, and the record contains adequate support for the general verdict for damages. However, we next consider the District's arguments about excessive damages in terms of the new trial motion grounds urged.

C

Applicability of Contract Damages Limits: New Trial Motion

The District next argues the contractual damages limit in section 17.4 of the agreement was not properly applied, so that the verdict was not supported by the record. Section 17.4 of the general conditions provides in relevant part that when the District terminates a contract for its convenience, the District shall pay the contractor damages for

"work actually performed and in place," as discussed above, with a reasonable allowance for profit and overhead, and such reasonable termination expenses as are shown, *but such payments shall not exceed the following*:

> " . . . *the total Contract Price as reduced by payments previously made to the Contractor and as further reduced* by the value of the Work as not yet completed. The Contractor shall not be entitled to profit and overhead on Work which was not performed as of the effective date of the termination for convenience of the District." (Italics added.)

The District's new trial motion papers calculated the maximum damages allowable to HAR under this formula as follows: Take the contract amount of $2.3 million; subtract the amount paid to HAR (about $490,000) and then subtract the amount of work admittedly remaining under the contract (approximately $1.27 million, the "balance to finish"). This results in a figure of approximately $540,000 (exclusive of termination costs).

Therefore, the District appears to concede in this portion of the argument that the proof at trial supported an award of $539,239.54 for damages, and further, that at least $58,726.20 in termination costs was proven through expert Baker's calculations. The remaining disputes are over the difference between the $860,000 damages verdict and this "permissible" amount (approximately $598,000), so that the District is claiming the judgment remains excessive under section 17.4 in the amount of approximately $262,000 or more.

The District offers two grounds for us to reach the conclusion that the new trial motion should have been granted or the verdict amount reduced to $597,966.74. First,

the District argues a de novo interpretation of the contract, particularly the change order provisions, requires this result as a matter of law. Second, the District contends that since this was a public works contract, these contractual procedures had to be strictly construed to protect the public, which should result in a conclusion that the District never approved the extra work outside of the original schedule of values. In either case, the $226,000 change orders would not be payable, and neither would any extra compensation for the 52 extra days worked. The District likens this request to one for reduction of a damages verdict that is subject to the statutory limits of MICRA; however, we find that comparison wholly inapposite, where no governing statute applies.

In contrast, HAR seeks to have a substantial evidence standard of review applied, and a finding made that the record fully supports the verdict. Also according to HAR, there is no such reasonable contractual interpretation that would limit HAR's recovery for additional work that it performed at the District's request. Further, HAR continues to contend that the District's agreement at trial that HAR could drop its warranty cause of action (negligence in preparing plans) amounted to a waiver of any reliance on the contract language to limit damages. As already discussed above, we do not interpret it that way, and all breach of contract (not warranty) arguments remained viable at trial.

To address these claims, we first observe that section 17.4 cannot be read in isolation from the other provisions in the general conditions. The original contract price was $2.3 million for certain work as outlined, and under section 8.1 et seq., the schedule of values procedures and the progress payments structures were set up. Also, the contract includes the provisions in section 11.1 et seq. for change orders. All these contract

provisions had to be read together, and the trial court and counsel agreed before the verdict that the revised schedule of values would not control regarding damages unless it had been received and deemed approved by the District.

Much testimony at trial addressed the interactions between the parties in terms of the efforts to reconcile the architect's plans to the measurements and on-site observations by HAR personnel. After four months of give and take and changes in plans, the termination for convenience took place. The evidence supported a conclusion that during this process, the original contract had been modified and additional work added and accepted by the District, even though there were admitted difficulties in exchanging paperwork, and not all signatures were obtained. The revised schedule of values reflected some of these changes, and others were reflected in the April 3 request for payment and change orders, as well as the June 25 documents. It is not proper to read the termination for convenience section, section 17.4, without also acknowledging that other portions of the contract allowed for changes in the work to occur before that time. As a preliminary conclusion, we disagree with the District that the damages limitation language set forth in section 17.4, as quoted above, must override the change order and schedule of values procedures also found in the contract. Nor do we accept its implied argument that HAR did not prove the District's approvals of extra work took place.

The District's next contention, apparently newly raised on appeal, also lacks merit: that the public works nature of this contract requires particularly strict adherence to contractual procedures. The purposes of the public contracting statutes, which are enacted primarily to protect the public from misuse of public funds, do not require such a

result here. (See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 314.) For example, Public Contract Code section 7105, dealing with modification of contract terms for regulatory compliance and exemptions, allows such a contract to be terminated, amended, or modified if the termination, amendment, or modification is provided for in the contract or is authorized under another provision of law. (Pub. Contract Code, § 7105, subd. (d)(2).) "The compensation payable, if any, in the event the contract is so terminated shall be determined as provided in the contract or applicable statutory provision providing for the termination." (*Ibid*.) These general conditions likewise provided for such modifications and amendments to be implemented by the parties. (§ 11.1 et seq.)

Similarly, the District cannot properly rely upon Education Code section 17604, because there is no contention here, as covered by that statute, that this contract was never duly approved or ratified by the governing board of the District (and such approval would also encompass its modification and termination provisions). Those public policies are not offended by enforcing the contract against the District. (Also see *Tonkin Construction Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828, 831-832 [public entity contractual obligations are enforceable in same manner as an individual's contract, according to the parties' intent].)

Nor can the District bring this contract within the equitable principles of contract abandonment, so as to prevent its enforceability as modified. (See *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 232, 234-242 ["Under the abandonment doctrine, once the parties cease to follow the contract's change order process, and the

final project has become materially different from the project contracted for, the entire contract--including its notice, documentation, changes, and cost provisions--is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all of its work. Were we to conclude such a theory applied in the public works context, the notion of competitive bidding would become meaningless"].) This record does not show such abandonment of the basic contract structure or objectives.

In conclusion, the District has failed to show the judgment is erroneous because it is based on the general verdict. This verdict and judgment do not exceed a calculation that would be otherwise allowed by section 17.4. Evidence was presented, and the jury impliedly found, that over the course of the dealings between the parties, the District actually authorized other expenditures and change orders above that level. Sufficient compliance with contractual procedures was shown, such that the contract is enforceable as modified and the damages award was allowable. The new trial motion was properly denied.

III

CROSS-APPEAL: DENIAL OF AWARD OF ATTORNEY FEES AND PREJUDGMENT INTEREST

A

Applicable Standards

HAR's cross-appeal seeks reversal of the posttrial order denying its motion for attorney fees. At the hearing, the trial court rejected HAR's argument that the action was brought on the bond for purposes of enforcing its separate attorney fees clause against the

District. Instead, the trial court ruled that the attorney fees clause in the bond did not create a right to attorney fees that did not otherwise exist on HAR's behalf.

HAR is correct that de novo review of this legal conclusion is proper on appeal. "On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.] [¶] Stated another way, to determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [contract], and the facts are not in dispute, such review is conducted de novo. [Citation.] Thus, it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. [Citation.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142; *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102.)

"Courts will construe together several documents concerning the same subject and made as part of the same transaction [citation] even though the documents were not executed contemporaneously [citations] and do not refer to each other [citations]. It is generally a factual question whether several documents were intended to govern the same transaction. [Citations.]" (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 378.) However, where no conflicting evidence is presented concerning the meaning of

competing fee provisions, "it is a question of law for the courts to determine whether the attorney fee provision was part of the parties' contract." (*Id.* at pp. 379-380.)

Here, we are concerned with a fees provision in a performance bond. "Surety contracts are construed according to the same rules that govern interpretation of all contracts. [Citations.] . . . [¶] Thus, as a general rule, a contract performance bond will be read with the contract." (*Pacific Employers Ins. Co. v. City of Berkeley* (1984) 158 Cal.App.3d 145, 150.) When the contract and bond are construed together, however, the guarantee provided by the performance bond does not necessarily extend to performance of all covenants and agreements contained in the contract, such as an implied covenant to pay for materials (which a stranger to the bond and the underlying contract had sought to enforce in one of the authorities referenced in that case). (*Id.* at pp. 151-152.) In *Pacific Employers*, the surety who had issued the performance bond was found to be subject to a provision in the underlying incomplete contract for liquidated damages, due to the close relationship between the two contracts.

To determine whether a right to attorney fees contained in a bond is enforceable by a prevailing party in an action, it must be determined from the pleadings whether the action was "brought upon a bond." (*Leatherby Ins. Co. v. City of Tustin* (1977) 76 Cal.App.3d 678, 690.) Another relevant factor to be evaluated is the sequence of events after the status as a surety on the bond is established (and, in that particular case, subrogation status). (*Ibid.*)

We next analyze these competing attorney fees provisions together, under basic contract interpretation principles, in light of the sequence of events in these cross-actions, concerning the enforceability of the performance bond and its fees clause.

B

Contract Provisions

The performance bond purchased by HAR from the surety, Gulf Insurance Company, included an attorney fees clause referring to recovery of fees from the surety, in the event a successful suit is "brought upon the bond" by the "owner" (the District). HAR therefore characterizes the District as a third party beneficiary of the bond provisions. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436 [A third party beneficiary must show, as a matter of contract interpretation, that the contracting parties actually intended to promise the performance which the third party beneficiary seeks].)

HAR seeks to have all the contract documents read as a whole, beginning with the separate agreement that showed HAR's successful $2.3 million bid, and which defined the "contract documents" as including many component parts, such as the performance/material bonds, the "General Conditions," the specifications and drawings, etc. Those general conditions in turn refer to the "contract documents" as consisting of the agreement, the general, special, and supplemental conditions, the drawings and specifications, "and any other documents listed in the Agreement." (§ 1.5.) This provision, section 1.5, continues, "The Contract Documents form the Contract for Construction."

Also found in the general conditions is section 19.13, entitled "Attorney's fees," stating, "*Except as expressly provided for in the Contract Documents*, or authorized by law, neither the District nor the Contractor shall recover from the other any attorneys fees or other costs associated with or arising out of any legal, administrative or other proceedings filed or instituted in connection with or arising out of the Contract Documents or the performance of either the District or the Contractor thereunder." (Italics added.) In its moving papers, HAR acknowledged that this section of the general conditions is "somewhat inconsistent" with the attorney fees clause in the bond, on which it mainly relied, and which had been provided according to the general conditions' requirements.

C

Analysis

HAR's main contention is that the intent of the parties was to allow the bond, as one of the many listed contract documents, to be enforceable for purposes of awarding attorney fees. This argument would invoke the reciprocal attorney fee entitlement created by Civil Code section 1717, by bringing in the District as a third party beneficiary who could have sought fees under the bond. HAR argues the underlying action by Western Laboratory was "brought upon the bonds," and therefore the related and consolidated HAR action and cross-actions were similarly derived from the bond, since they all involved the same construction project.

Before addressing the main argument, we first dispose of HAR's secondary contention, entitlement to a fees award under an estoppel theory. HAR claims that

because the District included attorney fees requests in its own previous pleadings (answers in the main action and a cross-action), it cannot deny that attorney fees are awardable against it. In *Sessions Payroll Management, Inc. v. Noble Const. Co., Inc.* (2000) 84 Cal.App.4th 671, 681-682 (*Sessions*), the court relied on several previous authorities to reject such an application of judicial estoppel as a basis for awarding fees against a party, merely because that party had previously alleged a contractual right to recover attorney fees. (Citing, e.g., *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1306.) The court in *Sessions*, *supra*, 84 Cal.App.4th 671, found it significant that the contract did not support an interpretation that the parties intended to benefit anyone else, such as the claimant (a nonsignatory suing as a third party beneficiary), by including it within their contractual attorney fee clause. (*Id.* at pp. 681-682.) Also, the nonsignatory would not have had a right on its own behalf to recover fees under that clause. (*Ibid.*)

To the contrary, in *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1186-1192, the court concluded that a party's previous claim of entitlement to attorney fees, based on a contract that contained a fees provision, will judicially estop that same party from contending the same provision does not authorize an award of attorney fees against it. The views of this case have not been found persuasive in any cited cases. (E.g., *M. Perez Co. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 463-470.)

We need not enter into this doctrinal dispute about the effect of judicial estoppel on attorney fees clause enforcement, because it is not necessary to use that technical basis

to decide this case. Rather, the better approach is to examine the contract language in light of not only the pleadings but also the procedural context and history of this dispute. First, it is not dispositive that the original, underlying action by Western Laboratory (settled before trial) was "brought upon the bond." Western Laboratory was a subcontractor with HAR who delivered materials but was not paid for them, due to the termination for convenience, until the District separately agreed to do so. It was arguably consistent with the purpose of the bond, to ensure performance, that the subcontractor could rely upon it. (*T&R Painting Construction, Inc. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 Cal.App.4th 738, 744; also see 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 158, p. 680 and supplement, pp. 172-173, in which the authors extensively discuss various authorities about when a construction contractor's surety is bound by the contractor's agreement; citing, e.g., *Boliver v. Surety Co.* (1977) 72 Cal.App.3d Supp. 22, ["the contract between plaintiff home builder and defendant contractor provided for attorneys' fees to the successful party, but the surety contract between the contractor and surety did not contain an express provision to that effect. *Held*, nevertheless, the surety was liable for fees. Under general principles of suretyship law, the surety's liability is commensurate with that of the principal. [Citation.] Hence, if the principal contract provides for fees to the owner in a successful suit against the contractor, the owner may recover such fees in a successful suit against the contractor's surety. [Citations.]"].) Our case is different, because the surety is not involved and the principal contract does not include an attorney fees authorization.

Notwithstanding the litigation by Western Laboratory, by the time HAR sued the District, HAR's action was founded upon its separate construction agreement which incorporated not only the bond but also the general conditions, as well as numerous other documents. HAR had procured the bond to comply with one of the general conditions, section 6.10, and the same general conditions contained an entirely different attorney fees provision (each party to bear its own, except as expressly provided for otherwise). The parties were well aware of the general conditions, which provided the focus of most of their disputes, and the most reasonable interpretation of their intent upon entering into their construction agreement is that the specific no-attorney fees clause in the general conditions controls over the other incorporated documents, such as the bond.

Accordingly, it is difficult to construe this breach of contract action, based on the entire construction contract, as having been "brought upon the bond," merely because a different action by a HAR subcontractor had invoked the bond provisions. It is not dispositive that the same construction project was involved, nor that the actions were consolidated. The record as a whole shows that the main focus of the current dispute arose from the general conditions, and the areas of dispute in construction were not related to any requests to enforce the performance bond. Even though we must read the contract and bond together, we view the HAR performance bond issues as peripheral to the main dispute, even though the acquisition of the bond was contractually required in the general conditions. It is not a reasonable interpretation of the parties' agreement as a whole to order enforcement of the attorney fees provision in the bond under these circumstances, in light of the more specific language found in the general conditions

specifically pertaining to these parties (as opposed to the bond provision between the surety and HAR). We cannot say that any attorney fees entitlement to HAR is "expressly provided for in the contract documents" under section 19.13 of the general conditions. Civil Code section 1717 does not require a reciprocity finding in this instance.

DISPOSITION

The judgment is affirmed. Each party to bear own costs.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.